

#E1-1480
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May 26, 2005

Ms. Rini Ghosh
Section of Environmental Analysis
Surface Transportation Board
ATTN: STB Finance Docket No. 34284
1925 K Street, NW
Washington, DC 20423-0001

VIA TELEFAX: (202) 565-9000
& Regular Mail

RE: STB Finance Docket No. 34284 -- Adequate analysis of
cumulative impacts under NEPA for:

- (1) Vulcan Materials Company's planned Medina County stone quarry; and
- (2) Vulcan Materials Company subsidiary Southwest Gulf Railroad Company's
proposed rail line to serve Medina County stone quarry.

Dear Ms. Ghosh:

This letter will respond to two facets of the March 22, 2005 letter from Vulcan/SGR (EI-1431)—(1) the parties' continued disagreement over the scope of required analysis in the EIS, and (2) Vulcan's argument that the cumulative impact analysis contained in the Draft EIS is adequate.¹

Scope of Analysis: Connected Action

As you know, ever since STB announced that it would prepare an EIS, MCEAA has maintained that Vulcan's quarry and rail line are a single "proposal" within the meaning of NEPA.² As such, NEPA's implementing regulation for the scope of an EIS,³ which binds the agency,⁴ controls this case. Because the rail line has no independent utility, the applicable

¹ It remains the position of the MCEAA that the quarry and rail are connected actions, as addressed in previous correspondence to the STB. The purpose of this letter is that stated herein.

² 42 U.S.C. § 4332(C) (2000); *See also* *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

³ 40 C.F.R. § 1508.25(a) (2004).

⁴ *Id.* § 1500.3 (2004); *Sabine River Authority v. U.S. Dep't of Interior*, 951 F.2d 669, 678 (5th Cir. 1992).

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regulation⁵ pulls the quarry into the NEPA analysis to establish the true scope of the major federal action being proposed at this time.

Vulcan's March 22, 2005 does nothing to persuade us to the contrary. For now, it is sufficient to say that we fundamentally disagree over both the applicable law—*Public Citizen's* dictum or the clear and present EIS scope regulation⁶—and how it is to be applied—in one direction, from the proposed action to other actions, or in both directions simultaneously.⁷

Timing and the Content of the Administrative Record

The applicant has stated that they are obtaining state permits. Therefore it is possible that the quarry may no longer be a proposal at some time in the future.⁸ This places the agency and the community in a difficult position.

The agency has already issued a draft EIS, while both the quarry and the rail line were still proposed concurrently, that did not treat them as connected actions. Going forward, it will be interesting to see whether the agency illegally issues a final EIS or a license given the current state of the proposals in the record. Even assuming that Vulcan perfects its quarry proposal anytime in the future, the fact that the agency knowingly issued a draft EIS given the record before it at the time (and may choose to issue a final EIS and a license similarly in error) gives the strong impression of collusion between the applicant and the agency.

Vulcan accrues substantial benefit from receiving the rail license while concurrently proposing the allegedly unconnected quarry without NEPA analysis. Not only does Vulcan receive the financial benefit of a less rigorous analysis; it can literally, as it has here, delay

⁵ 40 C.F.R. § 1508.25(a)(1)(iii) (2004).

⁶ *Id.*

⁷ Vulcan's suggestion that the applicable test apply only in one direction makes the scope of the EIS vary at the whim of the applicant, which can either (1) withhold its potentially connected action from proposal until after the federal license is issued, or (2) propose both federal and nonfederal actions simultaneously, so long as it is the federal action that lacks independent utility. Besides undermining NEPA's goal of providing a sound basis for decisionmaking to federal and non-federal decisionmakers, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989), Vulcan's one-way test shifts the risk of the allegedly "unconnected" project onto the community, without full disclosure or mitigation of its consequences. Rather than fully accounting for the consequences of the allegedly "unconnected"—yet certain to occur—project as part of a baseline, an EIS in Vulcan's world, much like the one its contractor prepared here, views the lone federal proposal in a vacuum. The result, as here, is a half-hearted and legally inadequate disclosure of cumulative environmental harms.

⁸ However, as the *Hondo Anvil Herald* quoted Vulcan's Tom Ransdale on Feb. 19, 2004, Vulcan's Board of Directors has not yet approved the quarry project. We have no information on whether this has changed.

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opening the quarry for six years⁹ until it applies for¹⁰ and receives the rail license necessary for the overall proposed action (a rail-served quarry) to pencil out.

Vulcan of course vehemently denies this, yet continues to set the agency up to play the fool when it opens the quarry at some unspecified future date, undercutting the earlier public participation process.

Meanwhile, in perhaps the dumbest community relations strategy ever and obviously in lieu of meaningful public participation in this proceeding, Vulcan has been peddling a "good neighbor, environmentally conscious, maximum mitigation" line with respect to both the quarry and rail line from the beginning, while fighting tooth and nail any disclosure or public analysis of environmental harms with respect to the former. This renders any real discussion of mitigating cumulative harms impossible, because Vulcan is unwilling to undertake the legally required disclosure of the quarry's contribution to those cumulative harms. Instead, Vulcan and the agency hide behind the inadequate conclusory statements regarding the quarry's contribution currently contained in the draft EIS cumulative impacts section, particularly for flooding and damage to water supply wells.

Given that Vulcan's proposed quarry will produce over 5 million tons of aggregate per year, making it one of the largest if not the largest quarry in Texas, the basis for the community's deep mistrust could hardly be more clear. Vulcan's attempt to shift unanalyzed risk and environmental harm associated directly and cumulatively with the quarry onto the community, rather than disclosing it up front, is wrong, illegal, and, as more than six years have shown, just plain stupid.

**The Analysis of Cumulative Harm From Flooding and
Damage to Water Supplies To Date is Inadequate**

Irrespective of whether the quarry and rail line are connected actions, the agency is required to disclose those risks and environmental harms that are cumulative between the two proposals.¹¹ This it has not done, particularly with respect to flooding and damage to groundwater wells and water supplies. Therefore, as MCEAA has previously requested,¹² a supplemental draft EIS is required. The public must have the ability to comment on this information.

⁹ Vulcan began planning for the quarry in the spring of 1999.

¹⁰ Vulcan did not apply for a rail license from STB until February 2003. Draft EIS, ES-1.

¹¹ 40 C.F.R. § 1508.7 (2004) (defining cumulative impact). The agency agrees that the quarry is at least a cumulative impact, and claims to have so analyzed it.

¹² EI-1367, EI-1374.

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1. Legal standard

In practical terms, an agency's cumulative impact analysis under NEPA must answer three questions:

- Can you tell what the baseline is?
- Can you tell what the impact contribution of each project is?
- Can you tell what the total impact is, when added to any other cumulative impacts?

Under Section 706(2)(A) of the Administrative Procedure Act, a court may hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, or otherwise not in accordance with law.¹³

To make this finding a court will consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.¹⁴ When reviewing the "adequacy" of an EIS under NEPA, the consideration of relevant factors requirement is often expressed as a requirement for the agency to take a "hard look" at the environmental consequences of a proposed action and alternatives.¹⁵ A court may reverse the agency's decision as arbitrary or capricious if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the agency, or offered one that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.¹⁶

For cumulative impacts in particular, the agency must provide the public with "some quantified or detailed information; . . . [g]eneral statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided.¹⁷ The cumulative impact analysis must be more than perfunctory; it must provide a "useful analysis of the cumulative impacts of past, present, and future projects.¹⁸ Finally, cumulative impact analysis must be timely. It is not appropriate to

¹³ 5 U.S.C. § 706(2)(A) (2000).

¹⁴ *E.g.*, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

¹⁵ *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000).

¹⁶ *Dioxin/Organochlorine Center v. Clarke*, 57 F.3d 1517, 1521 (9th Cir. 1995); *Western Radio Services Co., Inc. v. Espy*, 79 F.3d 890, 900 (9th Cir. 1996).

¹⁷ *Kern v. BLM*, 284 F.3d 1062, 1075 (9th Cir. 2002).

¹⁸ *Id.*

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defer consideration of cumulative impacts to a future date when meaningful consideration can be given now.¹⁹

2. *Nature and scope of the harms*

Flooding

MCEAA has submitted voluminous documentary evidence²⁰ of recurring flood hazards in and around the town of Quihi.²¹ It is MCEAA's position that the rail line and quarry together will exacerbate this flood hazard and create new flood hazards as described in our previous comments.²²

Four main streams converge above the town site; Vulcan's preferred rail line alternative will cross each upstream of the town, along with at least three other streamlines.²³ The 1760-acre quarry site lies upstream of the rail line crossings of Polecat and Elm Creeks.²⁴ In addition, the rail line will be built up on berms of fill material all along its route, in exact locations which Vulcan and the agency have not disclosed. Based on the proposed routing, these berms will be either well within or on the border of the 100 year flood plain,²⁵ and will therefore alter it. The agency has not analyzed the impact of the berms.

The effect of all of this is to alter the hydrology of the region upstream of Quihi. The agency controls the cumulative flood risk from the quarry and the rail line to the extent that it controls the design and placement of the rail line.

¹⁹ *Id.*

²⁰ Draft EIS, D-6 to D-9, EI-60, EI-314, EI-1376, and photos attached to oversize maps submitted with DEIS comments (EI-1361/1362/1383).

²¹ Counsel for Vulcan denigrates the Quihi community in EI-1439: "As there is no town or other entity officially known as Quihi, we assume you are referring to a cluster of structures, approximately one mile west of where the preferred route would cross Quihi Creek." This vacuous depersonalization only underscores the irony that the longer Vulcan refuses to deal with the inanimate objects in the "structures" on a human level—by making the legally required public disclosure of cumulative harms—the more Quihi's very real community cohesion grows stronger. When, after six years, Vulcan is still trying to depersonalize the public out of fear of disclosure in a public process, it shows the psychology of previous investment.

²² E.g., EI-641 at 19-28 (MCEAA EIS scoping comments); EI-1374 at 42-43 (MCEAA Draft EIS comments).

²³ Draft EIS, 3-13.

²⁴ See Draft EIS, D-241, D-242, and figures in the record previously provided by MCEAA for a depiction of the relative location of floodplains, houses, historic sites, wells, and the sites of the proposed rail line and quarry.

²⁵ Draft EIS, 3-25 (Figure 3.3-7).

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To date, however, the agency has illegally abdicated its responsibility to analyze impacts from the design and placement of the rail line, instead delegating it to Vulcan as a mitigation condition, to be completed after the license has been issued. The duty to comply with NEPA, however, falls on the agency, rendering such delegation impermissible and contrary to NEPA's mandate for public participation and informed decisionmaking.

The agency does concede that:

Construction of the proposed rail line (any route) could have an adverse impact on flooding because it would require the crossing of a number of intermittent streams and could involve the use of fill (added material) at these stream crossings. . . The added fill would increase the width of floodplains above stream crossings because it would change the hydraulic conditions at the crossings.²⁶

Even so, the agency has chosen not to analyze further.

In addition, the agency ignores the considerable downstream impact of the bridges. The documentary evidence submitted by MCEAA²⁷ clearly shows that when frequent flash flooding occurs, flow does not remain within the banks of the channel over a large area. Because overland flow presently occurs, the rail line's berms and bridges will alter that flow on the upstream and the downstream side of the line. Overland or out-of-channel flow that used to spread over a wider area downstream may not be able to once the rail line is constructed. Likewise, overland or out-of-channel flow upstream that formerly did not reach out-of-channel areas downstream may be diverted by the berms and funneled through the bridge openings, actually increasing the volume of water reaching downstream areas.

The agency's solution is to impermissibly delegate the analysis to the applicant and then allow the applicant to voluntarily mitigate based on its own findings.²⁸ Even the substance of this mitigation ignores the relevant factors in the flood hazard analysis.

²⁶ Draft EIS, 4-34.

²⁷ Draft EIS, D-6 to D-9, EI-60, EI-314, EI-1376, and photos attached to oversize maps submitted with Draft EIS comments (EI-1361/1362/1383).

²⁸ Draft EIS, 5-2, 5-3, and 5-6. Earlier in the Draft EIS, the agency makes various promises, noting that Vulcan "has voluntarily agreed to design the stream crossings in a manner that *would not exacerbate pre-flooding risks*," at 4-34 (emphasis added), and recommending that "the Board impose a condition requiring [Vulcan] to . . . design the bridges . . . *without impounding water on the upstream side of the structure*," at 4-35 (emphasis added). The actual mitigation conditions do not contain these substantive requirements.

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First, the agency requires Vulcan to model only the bridges, which creates two problems: it fails to consider the berms along the rest of the rail line, and it fails to consider the effect of the quarry on the hydrology of the upper watershed.²⁹

Almost laughably, the agency argues that the berms (or at least the parts containing the rail beds) are "porous."³⁰ Therefore, the agency concludes "there will be minimal disruption to the natural drainage during construction of the proposed line."³¹ Yet in the previous section of the draft EIS, the agency recommends that "the Board impose a condition requiring [Vulcan] to . . . design the bridges . . . *without impounding water on the upstream side of the structure.*"³² The agency comes to this absurd position straight faced, because it has never analyzed the design or placement of either the berms or the bridges, yet has made a finding that the bridges, which at least contain some passage for water—but somehow, not the berms, which are solid—will impound water, alter the hydrology, and present an increased flood hazard.

Second, the agency requires Vulcan to comply with county and federal guidelines.³³ Under the county's development standards, the applicant must demonstrate that its project will not result in more than a one foot rise in the 100-year floodplain. The agency's presently proposed mitigation, however, does not require compliance with this standard, even though MCEAA has requested it as part of an upfront analysis.³⁴ The presently proposed mitigation requires only that Vulcan consult with the county floodplain administrator.³⁵

Even though Vulcan would have to obtain a county permit, in the view of the agency³⁶ and Vulcan,³⁷ the county could not legally deny or impose conditions on the permit—including the one foot increase in the 100-year floodplain limit—that would "prevent" construction or otherwise "regulate" rail construction or operation. When combined with the delegation of analysis, the result is 1) a post-license study that finds what Vulcan wants to find, and 2) recommended design modifications by the county that "prevent" construction when Vulcan decides how much it wants to spend.

²⁹ As we will see, the agency justifies this with only a conclusory statement. Draft EIS, 4-108.

³⁰ Draft EIS, 4-56.

³¹ *Id.*

³² Draft EIS, 4-35 (emphasis added).

³³ Draft EIS, 5-6.

³⁴ EI-1382.

³⁵ Draft EI, 5-3.

³⁶ See *Burlington Northern and Santa Fe Railway Co. v. City of Houston*, __ S.W. 3d __ (Tex.App.—Houston [14th Dist.] 2005) (adopting agency's amicus position that local and state governments can take no action of any kind, including judicially enforcing the "public use" requirement for eminent domain in the state's constitution, that would prevent rail construction).

³⁷ EI-1296 at 2-3 (arguing that county cannot deny a permit once license is authorized by STB).

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Meanwhile, the agency's analysis of flood impacts from the quarry consists of a conclusory statement. The draft EIS states that Vulcan's "use of Best Management Practices would prevent and control any stormwater runoff from the quarry site . . . Accordingly, no potentially significant adverse cumulative effects . . . are expected as a result of the quarry."³⁸

The quarry, as MCEAA has noted,³⁹ will increase flood risk (1) by removing all vegetation from significant portions of the quarry site adjacent to and flowing into Polecat and Elm Creeks; (2) by altering the hydrologic characteristics of the site by excavating, blasting into ledges, and piling debris; (3) by paving or rendering impermeable large portions of the site; and (4) by pumping significant amounts of groundwater for site use and dust control upgradient and then redepositing that water in a concentrated fashion to the groundwater table downgradient.

The agency has ignored all four of these impacts even though they are relevant factors to any cumulative impact analysis that would determine how the rail line should be designed and where it should be placed.

Worse still, the agency hides the quarry's impact by layering conclusory statements to obscure its lack of analysis. One example:

In the karst terrain of the Edwards Aquifer, there are complex regional interactions between surface and groundwater. In this area, surface water can enter local karst features, pass rapidly through subterranean solution zones, and re-emerge in surface springs miles downstream. However, no streamflow sites have been identified within the area of the proposed project.⁴⁰

The agency says "no streamflow sites have been identified" with all the certainty in the world, but this is really a cry for deference: on the record before it, the agency has no way of knowing the impact of groundwater-surface water interactions along most of the rail line. It has only completed a paper survey of the area's hydrography.⁴¹ Most of the analysis of groundwater infiltration comes from discussion of previous studies concerning the Edwards Aquifer recharge zone, which lies to north of most of the rail line and which encompasses only the portion of the rail line that enters the quarry. The geology of the area changes markedly south of the quarry—

³⁸ Draft EIS, 4-108.

³⁹ See e.g., E1-641, E1-1374.

⁴⁰ Draft EIS, 3-17.

⁴¹ Draft EIS 3-9, 3-13.

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indeed, that is the whole reason the quarry is located where it is, because the limestone formation dips sharply immediately to the south.

Further, for analyzing flood impacts the agency should be concerned with downstream or downgradient seepage of water out of the ground into the stream (the agency calls these the "streamflow sites" above). Yet the agency has done no modeling calibrated against real world results to show if its assumption that streamflow sites do not exist is correct. Indeed, the agency has not characterized the streamflow regime at all for stream crossings not located on the Edwards Aquifer, which would include all of the stream crossings except Elm Creek. Therefore, the agency cannot substantiate its conclusion or its disregard of streamflow sites as a relevant factor in the flood analysis.

Of course the larger problem is that the agency did not analyze impacts from the quarry at all, but the above example simply shows that the agency's justifications for not doing so are just as conclusory as its assumption that Vulcan will mitigate all as-yet-unanalyzed flood risk from the quarry. When it engages in this sort of jurisdictional hand-waving, the agency disclaims responsibility for both the cumulative harm from the quarry and the design and placement of the rail line in response to that cumulative harm. The result is analysis of the rail line in a vacuum.

Vibration Impacts to Groundwater

Most residents of the Quihi area rely on private wells for their water supply, to water livestock, and in some cases to irrigate their land. The residents of Quihi are familiar with damage to water supplies caused by quarry operations in other Texas communities, such as Tehuacana.⁴²

As MCEAA and its neighbors have expressed,⁴³ vibration from the quarry and the rail line may damage the wells themselves, septic tanks that would then pollute the wells, or may alter the subsurface environment so as to cloud and render unusable or dry up water supplies.

The draft EIS implicitly identifies private use of groundwater once,⁴⁴ but undertakes no further effort to either locate private wells or analyze impacts to them. To date the agency concludes there is no impact.⁴⁵ Yet the agency has only analyzed direct impacts to groundwater from spills and contamination associated from the rail line.

⁴² See e.g., *Vulcan Materials Co. v. City of Tehuacana*, No. 02-51182 (5th Cir., Jun. 4, 2004) (unpublished opinion), at 4 (city's residents noted at public hearing that quarry activities caused wells and springs in the area to dry up).

⁴³ See *infra*, p. 10-12 and accompanying citations to the record.

⁴⁴ Draft EIS, 3-7.

⁴⁵ Draft EIS, 4-7.

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The agency claims to have analyzed vibration impacts to "sensitive structures" including private wells,⁴⁶ finding an adverse impact from construction (pile driving) and operation of the rail line.⁴⁷ But the bare-bones 7-page vibration study the agency did complete was done for a preliminary cultural resources assessment way back when the agency was deciding whether to prepare an EIS.⁴⁸ This study neither identified nor accounted for impacts to private wells.

The agency hides the fact that it has not considered the relevant impacts on private wells by again impermissibly delegating the responsibility for analysis to the applicant during the mitigation stage, after the license has been issued:

Prior to initiating rail construction activities, [Vulcan/SGR] shall consult with property owners located adjacent to the rail right of way regarding the location and design of their private wells, ancillary structures, and pipelines in order to make appropriate modifications to the design of the rail line to maintain well, structure, and pipeline integrity.⁴⁹

Meanwhile, the draft EIS identifies adverse vibration from both the quarry (blasting) and the rail line. Then the agency makes the conclusory statement: "Because groundborne vibration is localized and occurs only close to the source, the impacts experienced by these structures would either be from the quarry or from the rail line, but not both."⁵⁰

The agency plainly has no basis for this statement. It has not completed any vibration study of the quarry's contribution to the cumulative harm. Moreover, because its original vibration study for the rail line did not identify the relevant structures, including private wells, the agency has no support in the record for the assertion that a well would not be impacted by both the rail line and the quarry. Numerous Quihi residents live within ½ mile of the quarry site,⁵¹ and the agency has not yet analyzed the impact on their wells or any other wells in the project area.

⁴⁶ Draft EIS, 4-10.

⁴⁷ *Id.*

⁴⁸ Draft EIS, 4-86 and Draft EIS Appx. I-5.

⁴⁹ Draft EIS, 4-86 and 5-9.

⁵⁰ Draft EIS, 4-114.

⁵¹ See e.g., maps shown at Draft EIS D-241 and D-242, and oversize maps submitted by MCEAA with its Draft EIS comments (EI-1361/1362/1383).

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MCEAA and its Neighbors Have Requested Analysis of the
Cumulative Harm Time and Again in This Proceeding

MCEAA and its neighbors have made their concerns about these issues and about the inadequacy of the agency's analysis to date abundantly clear. For the benefit of the record, we list the opportunities provided to the agency and to Vulcan:

The County Judge⁵² and Precinct 1 Commissioner have each, four times, requested a full analysis of flood impacts by the agency since this proceeding began back in 2003.⁵³ Each time they have been ignored.

The Texas Commissioner of Agriculture, a state elected official, has told the agency she was "worried about the implications of the proposed rail line being built through floodplain areas."⁵⁴

The Medina County Floodplain Administrator has written, corroborating MCEAA's documentary evidence of severe flash flood hazards and urging the agency to not permit increased flood impacts.⁵⁵

The Director of the East Medina County Special Utility District has written, corroborating MCEAA's evidence of area groundwater use, heavy rainfall events and seepage through the aquifer, and asking the right question in light of the agency's failure to analyze cumulative harm: "Even if the risk were negligible, why should these families in the East Medina County Special Utility District have to bear it."⁵⁶

In May of 2003, before the agency even made a decision to produce an EIS, MCEAA submitted a letter signed by 118 individuals⁵⁷ containing extensive detail regarding increased flood risk from Vulcan's proposed stream crossings and construction in the floodplain.⁵⁸

In June of 2003, when the agency held an open house meeting at which it did not accept oral comment, at least 17 individuals later sent in their own individual written comment

⁵² In Texas, the County Judge is the county's highest elected official and serves as its Chief Executive Officer. Handbook of Texas Online, <http://www.tsha.utexas.edu/handbook/online/articles/CC/muc9.html>

⁵³ EI-57, 154, 638, 879, 1270, 1352, 1421; EI-1369 at 69-70 (public meeting).

⁵⁴ EI-371.

⁵⁵ EI-1354.

⁵⁶ EI-1257.

⁵⁷ EI-74.

⁵⁸ Id. at 1-2.

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indicating that flooding was a concern.⁵⁹ At least 17 individuals did the same on the issue of water well damage.⁶⁰ At least 16 individuals not included in either of the previous categories commented on both issues,⁶¹ for a total of 50 comments.

Also prior to the agency's decision even to prepare an EIS, MCEAA made at least seven detailed submissions,⁶² including two lengthy submissions from its own technical consultant, Dr. Lynn Kitchen,⁶³ that described the cumulative flood and well damage harm in great detail.

When the agency requested comments on the scope of the EIS, MCEAA itself raised the issue of cumulative flood harm three times and provided detailed guidance to the agency on how to evaluate it.⁶⁴ In addition, at least 15 individual members and neighbors sent in their own individual written scoping comment indicating that flooding was a concern.⁶⁵ At least 25 individuals did the same on the issue of water well damage, many in great detail regarding the cumulative impact of blasting at the quarry and the operation of the rail line.⁶⁶ At least 21 individuals not included in either of the previous categories commented on both issues,⁶⁷ for a total of 61 individual comments.

Prior to the publication of the draft EIS, MCEAA also rebutted dismissive comments by Vulcan that urged the agency not to adequately analyze cumulative harm.⁶⁸

In June of 2004, MCEAA submitted via Congressman Henry Bonilla a petition requesting detailed study of both quarry and rail line impacts, signed by 776 individuals and the Castroville Conservation Society who identified themselves as affected by, among other harms, "loss of water supply due to damage to wells and septic systems," or "danger of flooding and increased flooding of property and roadways."⁶⁹

⁵⁹ EI-90, 92, 105, 113, 141, 151, 158, 159, 164, 166, 170, 171, 180, 215, 224, 229, 254.

⁶⁰ EI-96, 100, 101, 102, 104, 114, 115, 116, 124, 126, 127, 138, 144, 145, 172, 217, 218.

⁶¹ EI-86, 91, 95, 106, 109, 111, 122, 131, 134, 160, 167, 169, 173, 175, 225, 243.

⁶² EI-60, 146, 216, 221, 314, 315, 471.

⁶³ EI-146, 315.

⁶⁴ EI-640, 641, 645.

⁶⁵ EI-595, 611, 620, 622, 628, 629, 632, 655, 667, 672, 674, 678, 690, 700, 734.

⁶⁶ EI-614, 615, 618, 619, 623, 625, 630, 633, 643, 644, 647, 648, 654, 659, 663, 669, 670, 671, 673, 676, 685, 701, 705, 708, 710.

⁶⁷ EI-616, 621, 626, 627, 639, 642, 649, 651, 652, 660, 664, 665, 666, 668, 675, 687, 691, 693, 703, 704, 707.

⁶⁸ EI-781.

⁶⁹ EI-828, 894, 904.

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Upon publication of the inadequate analysis in the draft EIS, over 100 residents attended a public hearing on the document, many of them providing strong oral testimony regarding cumulative harms from the quarry and rail line.⁷⁰

After publication of the draft EIS, MCEAA submitted numerous detailed comments on its inadequacies, including cumulative flood and/or well damage harm.⁷¹

In addition, at least 13 individual members and neighbors sent in their own individual written comment indicating that the draft EIS analysis of flooding was inadequate and did not answer their concerns.⁷² At least 12 individuals did the same on the issue of water well damage.⁷³ At least 12 individuals not included in either of the previous categories commented on both issues,⁷⁴ for a total of 37 individual comments. Because the agency had not analyzed the cumulative harm, there was little for these commenters to do besides reiterate their scoping comments.

Overall, these issues have been placed before the agency by more than 1000 comments including the petitions. We have done so with all the detail that can reasonably be expected of public commenters—including guidance on how to do the actual analysis—without doing the analysis ourselves.

It is Time for the STB and Vulcan to Align Their Actions With Their Words

The failure to analyze the quarry's contribution to cumulative harm renders any mitigation of the cumulative harm impossible, even though the agency controls the cumulative harm to the extent that it controls the design and placement of the rail line. By relying on conclusory statements rather than disclosing cumulative harm, the agency analyzes the rail line in a vacuum, without considering the quarry as either part of the present environmental baseline or as a future proposal.

⁷⁰ EI-1369 and EI-1370 (transcript of public meeting); *See especially* EI-1369 at 23 (comments of David Barton); *Id.* at 27-29 (comments of Dr. Lynn Kitchen), 30-31 (comments of Nancy Schulte), 42 (comments of Tom Walpole), 43 (comments of Archie Gerdes), 45-46 (comments of Carl Kelley), 49 (comments of Scott Conrad), 53-54 (comments of Joe Balzen), 55 (comments of Robin Portenier), 68-69 (comments of Erna Balzen), 78-79 (comments of Lester Landrum), 83 (comments of George Rice); EI-1370 at 27 (comments of Tom Walpole), 29-30 (comments of Joseph Salomon), 63 (comments of Wayne Stansbury), 80 (comments of Jimmy Walsh).

⁷¹ EI-1374; EI-1287 & EI-1294 (same); EI-1353, 1361, 1376.

⁷² EI-1263, 1289, 1323, 1327, 1340, 1341, 1343, 1346, 1347, 1349, 1351, 1350, 1368.

⁷³ EI-1226, 1250, 1252, 1281, 1284, 1310, 1326, 1336, 1337, 1339, 1357, 1425.

⁷⁴ EI-1261, 1320, 1325, 1328, 1329, 1335, 1338, 1342, 1334, 1345, 1360, 1398.

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This allows Vulcan to shift the risk of the quarry's undisclosed impacts onto the community and demand from the community the land for the rail line that will make the quarry most economically viable, while avoiding incurring any costs for designing the rail line with reference to the quarry's impacts. The choice is clearly "your money (which for Quihi residents is their land) or your life (harm from flooding and damage to water supply)."

Throughout this proceeding, we have expressed our vehement disagreement with the agency's attempt to bend NEPA and state eminent domain law to suit its policy preference for non-rail applicants - Vulcan in this case - to have it both ways. We will continue to do so. Shifting the risk onto the community and forcing individuals, many of them well into retirement and on fixed income, to bring inverse condemnation suits after harm has occurred, rather than disclosing environmental consequences fully and fairly up front, as required, is a clear abdication of agency authority.

But even this is not enough for the agency. It plays it both ways with its mitigation authority as well.

Compare the draft EIS in this proceeding:

The Board has *limited authority* to impose conditions to mitigate potential environmental impacts. As a government agency, the Board can only impose conditions that are consistent with its statutory authority. Accordingly, any conditions the Board imposes must relate directly to the transaction before it, must be reasonable, and must be supported by the record before the Board. The Board's practice consistently has been to mitigate only those impacts that result directly from the proposed action. The Board typically does not require mitigation for pre-existing environmental conditions.⁷⁵

with the final decision in another:

[W]e have *broad power* to impose conditions, so long as they are supported by the record and there is a sufficient nexus between the condition imposed and the transaction before us. Accordingly, *we plainly have authority* to impose mitigation to address the effects of increased operations on the existing line that would not occur but for the expansion of DM&E's system authorized here.⁷⁶

⁷⁵ Draft EIS, 4-13 and 5-1.

⁷⁶ Final Decision, Dakota, Minnesota & Eastern R.R. Corp., Construction Into the Powder River Basin, 2002 WL 121210 (S.T.B. Jan. 28, 2002).

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The STB does not want to mitigate cumulative impacts in our proceeding because the applicant doesn't want to analyze them.

While it may be true that STB has no authority to mitigate harm resulting solely from the quarry, the agency controls the cumulative harm to the extent that it controls the placement of the rail line. It is simply a lie to suggest that the agency lacks the power to impose mitigation conditions on the rail line to abate cumulative harm.

The Chairman of the Surface Transportation Board, Roger Nober, has written favorably of negotiated approaches to resolve conflicts associated with the environmental impacts of federally authorized construction projects.⁷⁷ It is time for the STB to align its actions with its words, and to resolve the larger issues associated with its policy choice to give non-rail entities the ability to obtain common carrier licenses. Foremost in our mind is the issue of accounting for cumulative harm.

Vulcan will make much of the fact that, in light of the inadequate draft EIS, MCEAA has voted to authorize litigation against STB if necessary. The key is if necessary.

We think that litigation against the agency may be able to be avoided if the agency analyzes the cumulative harm completely and in a manner that meets the legal requirements for adequacy discussed above and commits to mitigate appropriately, up front, before the license is granted. For flooding, that analysis has been laid out by MCEAA in previous submissions. Though the cumulative well damage analysis necessary depends on uncertain inputs (location and frequency of inputs from blasting, in particular), the agency cannot ignore these effects.⁷⁸ In addition, MCEAA and its neighbors will want a binding commitment from Vulcan to document or accept documentation of existing conditions and to replace damaged water sources. Other issues may become apparent as discussions progress. For instance, MCEAA believes that it is entitled to a fuller explanation of why the Medina Dam alternative route it submitted was not the one ultimately considered and dismissed by Vulcan and the agency.

MCEAA is, as it has been, willing to sit down with the agency and Vulcan. However, the bottom line is that cumulative flood risk and well damage harms must be analyzed and fully mitigated up front in a substantially similar manner to that described above. No exchanges of

⁷⁷ See Roger Nober, *Federal Highways and Environmental Litigation: Toward a Theory of Public Choice and Administrative Reaction*, 27 HARV. J. ON LEGIS. 229 (1990).

⁷⁸ *Mid States Coalition v. STB*, 345 F.3d 520, 549 (8th Cir. 2003).

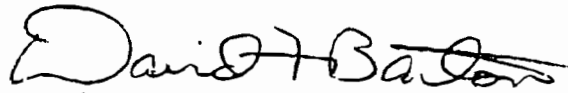
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land or easements will be discussed as a condition of the above. Given the current state of the record, the choice for the agency is clear: address the cumulative harm.

Very truly yours,

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David F. Barton

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